PP v. CHUA BENG SEONG & ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEALS NO: 42LB-63-10-2013 & 42S-7-2-2014]
12 APRIL 2016

CRIMINAL LAW: *Corruption – Corruptly soliciting gratification – Gratification as inducement to help company obtain tender for project – Amount of gratification solicited unclear – Whether presumption under s. 42(1) of Anti-Corruption Act 1997 arose – Whether essential element of offence under s. 10(a)(aa) of Anti-Corruption Act 1997 proven – Whether prosecution failed to make out prima facie against appellant*

CRIMINAL LAW: *Corruption – Corruptly receiving gratification – Gratification for helping secure tender for project for company – Amendment of charge pursuant to s. 158(1) of Criminal Procedure Code – Whether occasioned prejudice to appellant – Whether appellant represented to company that he could help secure tender for project by submitting favourable report – Whether evidence showed appellant requested money from company in exchange for not disturbing works on site – Discovery of marked notes with appellant – Whether constituted independent corroborative evidence leading to irresistible conclusion of appellant receiving money corruptly – Whether prima facie case proved against appellant – Malaysian Anti-Corruption Commission Act 2009, ss. 16(a)(A), 50(1) & 52(1)*

Khasal Jaya Sdn Bhd, a company owned by SP6, had secured a project by way of a subcontract for a tender for works related to improvement of works infrastructure at the Industrial Zone at Bayan Lepas ('Package 1), which was under the supervision of the Majlis Perbandaran Pulau Pinang ('MPPP'). MPPP appointed the appellant's company, Jurutera Konsultant, as their consultant engineer, who was in charge of preparing the specification and scope of works for the project. The appellant's company was also required to prepare a valuation report for each applicant for the tender and was in charge of the overall supervision of the project. MPPP would rely upon the valuation report prepared by the appellant in making its recommendation to the tender board. The prosecution's case was that while works for Package 1 was still ongoing, the appellant informed SP6 that the offer for tender for Package 2 would be out very shortly and that he would be able to help SP6 in securing the project by supplying him with information regarding the tender price. According to SP6, the appellant had asked for the sum of RM400,000 from SP6 in order to secure the tender for the project. Subsequently, a letter of offer ('P6') was issued to SP6's company after they succeeded in securing the tender for Package 2. Thereafter, according to SP6, the appellant started asking him for the sum of RM400,000 in accordance with the appellant's earlier request. According to SP6, at first he paid no heed to the appellant's demand until the latter started to cause problems at the site

of the project and interim payments due were duly withheld. On 1 July 2009, SP6 had gone to meet the appellant at the latter's office to discuss about the payment of RM400,000 and its reduction and it was alleged that the appellant had agreed at that meeting to reduce the demand to RM350,000. Subsequent to the meeting with the appellant, SP6 lodged a report ('P10') with the Malaysian Anti-Corruption Agency ('MACA'). As a result of the report made, a trap meeting was arranged and headed by SP7 for the delivery of marked notes amounting to RM350,000 to the appellant. On 8 July 2009, SP6 accompanied by SP5, an officer from the MACA, headed for the appellant's office where he proceeded to leave the bag containing the marked notes on the floor near the appellant's right leg at the latter's request. The appellant was then seen taking the bag and proceeding in the direction of the lift area when SP8, who had witnessed the whole incident, arrested the appellant. After the arrest, the appellant was brought to the office of the MACA. Under the first amended charge, the appellant was charged under s.10(a)(aa) of the Anti-Corruption Act 1997 for, *inter alia*, soliciting the gratification of the sum of RM400,000 as an inducement to supposedly help SP6's company to obtain the tender for Package 2 and to supposedly refrain from interfering with work at the site while knowing that the selection process would be determined by the tender board. Under the second amended charge, the appellant was charged under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 for corruptly receiving gratification in the amount of RM350,000 from SP6, for helping SP6 secure the tender for Package 2 by submitting a favourable report. The Sessions Court Judge ('SCJ') acquitted the appellant at the end of the prosecution's case without calling for his defence in respect of the first amended charge when it found that the prosecution had failed to prove a *prima facie* case against him. In respect of the second amended charge, the SCJ found a *prima facie* case had successfully been proven by the prosecution and called for the defence of the appellant after which he was convicted and sentenced to three years imprisonment and a fine of RM1.75 million in default six months imprisonment. The appellant thus filed an appeal against his conviction and sentence in respect of the second amended charge while the prosecution filed a cross-appeal against the decision to acquit in respect of the first amended charge.

Held (dismissing appellant's appeal; dismissing prosecution's cross-appeal):

(1) The presumption of the gratification being corruptly solicited as inducement under s. 42(1) of the Anti-Corruption Act 1997 proceeded from the basic fact which was the solicitation of the gratification of the said sum of RM400,000 from SP6. As the evidence of the prosecution was unclear as to the amount of gratification solicited by the appellant, the basic fact in order to trigger the operation of the presumption was not proven by the prosecution and in all the circumstances, the

presumption under s. 42(1) of the Anti-Corruption Act 1997 could not have arisen against the appellant. The SCJ had not erred therefore when she held that as the evidence disclosed that the amount of the gratification sought was uncertain and had changed, an essential element of the offence under s. 10(a)(aa) of the Malaysian Anti-Corruption Act 1997 had not been proven. (paras 45 & 46)

(2) This finding on the part of the SCJ was a finding of fact that she was entitled to make after hearing and assessing the witnesses before her. The finding of facts were therefore entitled to great respect and must not be lightly interfered with save for good reason. On the authority of *Looi Kow Chai & Anor v. PP* and *Balachandran v. PP*, the SCJ had rightly held that the prosecution had failed to make out a *prima facie* case against the appellant in respect of the first amended charge. Thus, the cross-appeal of the prosecution was dismissed. (paras 47 & 48)

(3) The decision of the Sessions Court to amend the second amended charge was made pursuant to the provisions of s. 158(1) of the Criminal Procedure Code. The amendments were based upon the evidence given by the prosecution witnesses with regard to the purpose for which the money was sought for and which amounted to helping or 'membantu' P6's company in securing the tender. The amendments did not involve any addition but only an alteration to the charge and in all the circumstances had not occasioned any prejudice to the appellant. (paras 50-52)

(4) It was reasonable to conclude that as a result of the 'Laporan Penilaian Tender' (P5), SP6's company did obtain high marks and had tendered a low price which led to it securing the job for Package 2. It was clear that the appellant had informed SP6 that the tender for Package 2 would be out shortly and that he could help SP6 in securing the project. As the element of the charge was 'supposedly' or 'kononnya', all that the prosecution had to prove was that the appellant had represented to SP6 that he could help SP6's company to secure the tender for Package 2 by submitting a favourable report. On the facts, this was adequately proven. (paras 56 & 58)

(5) The gross disparity in the number of Engineering Instructions ('EI') issued before and after MPPP took over the site supervision clearly evidenced that the appellant was 'disturbing' the works in relation to Package 2 during his tenure. The issuance of the EI adversely affected the reputation of SP6's company and led to the inevitable delay in the completion of the project. It was also given in evidence that after the offer letter was issued to SP6's company, works commenced for Package 2 and SP6 had received an advance of RM2,700,011 million. It was after that that the appellant had started to ask for the money. It could be reasonably inferred that the appellant had indeed requested for the

money from SP6 at that point of time. There was thus ample evidence of the fact that the appellant had requested money from SP6 in exchange for not disturbing the works related to the project. (paras 60-64)

(6) As for the meeting on 1 July 2009 between SP6 and the appellant at the latter's office, the evidence of SP6 that the purpose of the meeting was to discuss the reduction of the sum of RM400,000 to RM350,000 which the appellant eventually agreed to, was not successfully rebutted by the appellant. This agreement of the appellant to reduce the sum as mentioned and his refusal of the offer to pay in instalments ultimately set the stage for the meeting on 8 July 2009 culminating in the arrest of the appellant. The occurrences that took place at the car park, followed by the placing of the bag at the post box area and the conduct of the appellant in looking around before picking up the said bag and walking towards the direction of the lift and his subsequent arrest with the bag in his possession was more consistent with the fact that at the meeting at the appellant's office on 1 July 2009, an arrangement was made for the sum of RM350,000 to be handed by SP6 to the appellant. The events that took place as described on 8 July 2009 was a follow up of the earlier aforesaid meeting and the telephone call that SP6 had made to the appellant prior to the meeting that day. The discovery of the marked notes with the appellant also constituted independent corroborative evidence which led to the irresistible conclusion that the appellant had received the money corruptly. (paras 66-79)

(7) The intent of s. 52(1) of the Malaysian Anti-Corruption Commission Act 2009 was thus to place accomplice evidence on the same footing as that of ordinary witnesses and therefore there was no necessity imposed upon the trial court to warn itself of the dangers of convicting on such uncorroborated evidence (*Rahiman Selamat v. PP*). In any event, the testimonies of SP5, SP8 and SP10 provided ample corroboration of the testimony of SP6 with respect to the receipt of the bag containing the marked notes by the appellant. The conviction of the appellant by the Sessions Court based upon the evidence of SP6 was thus not flawed in this respect. (paras 80 & 81)

(8) No less than four witnesses comprising SP6, SP5, SP8 and SP10 had testified that the bag containing the marked notes left on the floor at the lobby of the appellant's office was taken by him. When the appellant was arrested, he was also found holding the bag containing the marked notes. Under the circumstances, the statutory presumption under s. 50(1) of the Malaysian Anti-Corruption Commission Act 2009 arose and it was presumed that the money was given and received corruptly and it was then for the appellant to rebut the said presumption on a balance of probabilities. The SCJ had therefore not erred when she held that the prosecution had proven a *prima facie* case against the appellant. Thus, the SCJ was correct in the conviction of the appellant and the

sentence passed upon the appellant was appropriate. The appellant's appeal against his conviction and sentence in respect of the second amended charge was dismissed. (paras 86-90)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Gurbachan Singh v. PP [1967] 1 LNS 50 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
Philomene Thea v. PP [2013] 1 LNS 1497 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Ooi Seng Huat [1968] 1 LNS 109 HC ***(refd)***
PP lwn. Rahiman Selamat & Kes Yang Lain [2015] 3 CLJ 92 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 115 HC ***(refd)***
Ramly Md Yasin & Ors v. PP [1982] CLJ 200; [1982] CLJ (Rep) 724 HC ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997 (since repealed), ss. 10(a)(aa), 42(1)
Criminal Procedure Code, ss. 158(1), 162, 316
Malaysian Anti-Corruption Commission Act 2009, ss. 3, 50(1), 52(1)

(Criminal Appeal No: 42S-7-2-2014)
For the appellant - Muhammad Shafee Md Abdullah (Wan Aizuddin Wan Mohammed with him); M/s Shafee & Co
For the respondent - Nor Azah Kasran (Ahmad Ghazali Muhamad Nadzri with her); DPPs, Malaysian Anti-Corruption Commission

(Criminal Appeal No: 42LB-63-10-2013)
For the appellant - Nor Azah Kasran (Ahmad Ghazali Muhamad Nadzri with her); DPPs, Malaysian Anti-Corruption Commission
For the respondent - Muhammad Shafee Md Abdullah (Wan Aizuddin Wan Mohammed with him); M/s Shafee & Co

[Editor's note: Appeal from Sessions Court, Georgetown; Criminal Case No: 62-2-2010 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This case involved two appeals which were heard together. The respondent in Appeal No. 42LB-63-10-2013 is the appellant in Appeal No. 42S-7-2-2014 and in both these appeals is the accused, Chua Beng Seong, who was charged at the Sessions Court at George Town with the following.

[2] First amended charge (pertuduhan pertama pindaan):

Bahawa kamu, dalam tahun 2007, bertempat di 51-13C, menara BHL, Jalan Sultan Ahmad Shah, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah secara rasuah meminta suatu suapan, iaitu wang tunai RM400,000.00 daripada Khairul Adnan bin Hashim, pengarah Urusan Khasal Jaya Sdn Bhd sebagai suatu dorongan kerana kononnya akan membantu Khasal Jaya Sdn Bhd mendapatkan tender menaik taraf kerja-kerja infrastruktur di Zon Perindustrian Bayan Lepas dan Technoplex, MK 12, daerah Barat Daya, Pulau Pinang (Pakej 2) dan untuk tidak mengganggu kerja-kerja naik taraf infrastruktur tersebut yang dijalankan oleh Khasal jaya Sdn Bhd yang mana syarikat kamu iaitu CBS Jurutera Konsultant Sdn Bhd merupakan Jurutera Perunding untuk projek tersebut bagi pihak Majlis Perbandaran Pulau Pinang dan dengan ini kamu telah melakukan kesalahan di bawah s. 10(a)(aa) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah seksyen 16 Akta yang sama.

[3] Second amended charge (pertuduhan kedua pindaan):

Bahawa kamu, pada 8 Julai 2009, jam lebih kurang 10.45 pagi, bertempat di Ruang Legar Menara BHL, Jalan Sultan Ahmad Shah, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah secara rasuah menerima suatu suapan, iaitu wang tunai RM350,000.00 daripada Khairul Adnan bin Hashim, pengarah Urusan Khasal jaya Sdn Bhd sebagai suatu upah kerana kononnya akan membantu Khasal Jaya Sdn Bhd mendapatkan tender menaik taraf kerja-kerja infrastruktur di Zon Perindustrian Bayan Lepas dan Technoplex, MK 12, daerah Barat Daya, Pulau Pinang (Pakej 2) yang mana syarikat kamu iaitu CBS Jurutera Konsultant Sdn Bhd merupakan Jurutera Perunding untuk projek tersebut bagi pihak Majlis Perbandaran Pulau Pinang dan dengan ini kamu telah melakukan kesalahan di bawah s. 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24 Akta yang sama.

[4] The Sessions Court acquitted the respondent (accused) at the end of the prosecution case without calling for his defence in respect of the first amended charge when it found that the prosecution had failed to prove a *prima facie* case against him. In respect of the second amended charge, the Sessions Court found that a *prima facie* case had successfully been proven by the prosecution and called for the defence of the appellant (accused) after which he was convicted and sentenced to three years imprisonment and a fine of RM1.75 million in default six months imprisonment.

[5] The appellant (accused) filed an appeal against his conviction and sentence in respect of the second amended charge while the prosecution filed a cross-appeal against the decision to acquit the respondent (accused) at the end of the prosecution case in respect of the first amended charge.

[6] After hearing the appeal and the cross-appeal, I dismissed both the appeals in respect of second amended charge by the appellant (accused) and the cross-appeal by the prosecution in respect of the first amended charge.

Both the appellant (accused) and the prosecution, being aggrieved by my decision, have lodged respective appeals. This is my grounds of decision in respect of both these appeals.

Facts Of The Case

[7] The following factual account and chronology is common to both appeals. However, in order to eliminate confusion, and for the purpose of this narrative, the appellant (accused) in Appeal No. 42S-7-2-2014 and the respondent (accused) in Appeal No. 42LB-63-10-2013 will be referred to as the appellant.

[8] The salient facts of the case as unravelled from the evidence and contentions given by both the witnesses for the prosecution and the appellant during the trial reveal that in the year 2006, Khasal Jaya Sdn Bhd, a company owned by Encik Khairul Adnan (SP6) who was a class A contractor, secured a project by way of a subcontract from DTE Construction Sdn Bhd, for a tender for works related to improvement of works infrastructure at the Industrial Zone at Bayan Lepas and Technoplex, MK12, South West District, Penang (Package 1).

[9] The said project (Package 1) was under the supervision of the Majlis Perbandaran Pulau Pinang (MPPP) and financed by MIDA. The value of the project was in the region of RM6 million. For the project, MPPP would appoint the contractor through a tender system. The decision to appoint the contractor would lie with the Lembaga Tender Persekutuan (Tender Board). In the tender process, MPPP would issue a tender advertisement and the prospective contractor would apply by filling in a tender form and would have to comply with the requisite conditions.

[10] MPPP also acted as a secretariat for the tender process and would prepare all the necessary working papers for certification by the Tender Board as well as a valuation report for each contractor which would be prepared by their respective consultant engineers. MPPP appointed the appellant's company, Jurutera Konsultan as their consultant engineer.

[11] As the consultant engineer, the appellant's company would prepare the specification and scope of works for the project. The appellant's company was also required to prepare a valuation report for each applicant for the tender. It was contended by the prosecution that MPPP would rely upon the valuation report prepared by the appellant in making its recommendation to the Tender Board. The appellant's company would also be in charge of overall supervision of the project.

[12] The prosecution case is that at the end of 2006, while works for Package 1 was still ongoing, the appellant informed SP6 that the offer for tender for Package 2 would be out very shortly and that he (the appellant) would be able to help SP6 in securing this project by supplying him with

information regarding the tender price. In doing so, SP6 would be able to easily predict with some accuracy the price that ought to be quoted in the tender process. This contention was denied by the appellant.

[13] Following from this, according to SP6, he and SP11, who was his partner in Khasal Jaya Sdn Bhd at the material time, went to the appellant's office at Menara BHL, Jalan Sultan Ahmad Shah, Penang some time in early 2007 and was told that the range of price for the tender was between RM11 million to RM13 million. SP6 then submitted the tender form quoting RM11.175 million to MPPP.

[14] According to SP6, when they were at the appellant's office, the appellant asked for the sum of RM400,000 from SP6 in order to secure the tender for the project. The appellant, according to SP6 also assured him that there would be no disturbances or interruption to the works for the said project at the site. The appellant denied that this took place.

[15] To continue the prosecution narrative, according to SP3, Encik Adnan who was the Chief Engineer for MPPP, he would prepare a working paper for the report of certification of tender (exh. P7) for consideration by the Tender Board in respect of Package 2. According to SP3, the working paper would be submitted together with the tender valuation report. This report would be based on the tender valuation report (P5) prepared by the appellant. According to SP3, only he and the appellant would know about the estimate price.

[16] SP3 further said that in P5, the appellant awarded a high mark of 90 to SP6's company although other companies quoted lower figures. The appellant also awarded high marks for Package 3 to SP6's company through P5 but the project was awarded to another company instead. According to SP3 still further, the Tender Board would decide which tender would be successful.

[17] The appellant on the other hand, said that the tender valuation report or "laporan penilaian tender" (P5) was in accordance with the Jabatan Kerja Raya (JKR) format and that the marks awarded in the same was based on the documents tendered by SP6. It was also submitted by the appellant that Package 2 was awarded to Khasal Jaya Sdn Bhd through an open tender. The appellant also said that he was not involved in the preparation of exh. P7 (Laporan Perakuan Tender) by MPPP.

[18] A letter of offer (P6) was issued to SP6's company after they succeeded in securing the tender for Package 2. Works in respect of the project commenced on 7 May 2007. SP6's company received an advance of RM2.711 million for Package 2 in the third month of the project.

[19] Thereafter, according to SP6, the appellant started asking him for the sum of RM400,000 in accordance with appellant's earlier request. According to SP6, at first he paid no heed to the appellant's demand until the

latter started to cause problems at the site of the project until various Engineering Instructions (EI) were issued for frivolous reasons and interim payments due were unduly withheld.

[20] The allegation that there were incidences of disturbance or "mengganggu" was denied by the appellant who contended that from the evidence adduced, the three "worst" EI issued namely, EI No. 36, EI No. 41 and EI No. 44 were not unjustified or without basis. In respect of the allegations on the disturbance "mengganggu" on the valuation of the interim progress payments made by the appellant, the appellant contended that the procedure for the certification of interim payments was adhered to.

[21] SP6 testified that he together with SP11 went to the appellant's office and brought along a sum of RM270,000 in an attempt to pay the appellant but the latter rejected the payment. It is also the prosecution's case that SP6 had gone alone to meet the appellant at the latter's office on 1 July 2009 with a view to discussing the payment of the sum of RM400,000 and its reduction. By that time, SP11 had left the employment of SP6's company. According to SP6, the appellant had agreed at that meeting to reduce the demand to RM350,000.

[22] To the contrary, the appellant testified that SP6 came to his office on 1 July 2009 with the objective of discussing problems with the Bomanite concrete imprints with a view to changing them to Jetred Stone pavements instead. The appellant also contended that SP6 at that meeting had asked him to re-approve the rejected MDC PC drain, without SIRIM approved certification, for the Package 2 project. SP6 also told the appellant that he had problems with other suppliers who refused to grant him credit terms. The appellant further said that SP6 also discussed regarding the extension of time (EOT) for Package 1. The appellant said that most of their conversation was heard by SD5 as the door to the meeting room was opened.

[23] Subsequent to the meeting with the appellant on 1 July 2009, SP6 testified that he met with his lawyer, one YB Jason who advised him to lodge a report (P10) with the Malaysian Anti-Corruption Agency (MACA) which SP6 did on 3 July 2009. As a result of the report made, a trap meeting was arranged and headed by SP7 for the delivery of marked notes amounting to RM350,000, to the appellant. The date set for the trap meeting was on 8 July 2009.

[24] The trap money in the form of marked notes was then given to SP6 to handover to the appellant. According to SP6, he made a telephone call to the appellant which was recorded by the MACA. During the telephone conversation, SP6 told the appellant "the money with me" to which the appellant replied "ya". The tape recording (P25a) and the transcript of the conversation (P25c) was tendered in court during the trial.

[25] On 8 July 2009, SP6 accompanied by SP5, who was an officer from MACA, went in a car and headed for the car park at the appellant's office at Menara BHL. On arrival, SP6 waited in the car until the appellant came over. SP6 testified that he then showed to the appellant the trap money which was placed in the boot of the car.

[26] According to SP6, he lifted a plastic that covered the bag containing the money and asked the appellant if he wanted to count the money to which he replied "never mind, bring it along". The whole incident was said to have been witnessed by SP10 who was nearby. According to SP6, he then brought the bag containing the marked notes and headed for the hallway or "ruang legar" at Menara BHL.

[27] SP6 said that he saw the appellant waiting near the post box area and he then left the bag containing the marked notes on the floor near the appellant's right leg at the latter's request after which they shook hands and exchanged some words. SP6 then asked the appellant when he could submit the extension of time (EOT), to which the appellant replied "later". SP6 thereafter headed for his car.

[28] According to SP8, after SP6 left the bag containing the money near the appellant, he saw the appellant open the post box, look left and right and then take the bag and proceed in the direction of the lift area. SP8 then arrested the appellant who was holding the bag at the time after identifying himself. At the time the lift button was already pressed. After the arrest, the appellant was brought to the office of the MACA.

[29] The appellant's version of events was that when SP6 called him over the phone, the line of communication was bad and he had heard SP6 say the word "dummy" instead of "money". The appellant said this was because he thought SP6 had wanted to discuss about the concrete imprint and the outstanding issues regarding Package 1, which was the subject of discussion at the meeting on 1 July 2009 at the appellant's office as well as the extension of time (EOT) application which SP6 said he would bring along together with the dummy concrete imprints.

[30] The appellant further said that he never agreed to meet at the car park and that it was SP6 who had said that he would call the appellant when he reached the car park. The appellant said that he was already downstairs and on his way to Penang Club for a coffee break with SD2 and one Dato' Haniffa after a meeting at his office but nevertheless at SP6's request went to the car park to meet him. The appellant also testified that he did not wait at the post box but that it was SP6 who asked him to go over to the post box to check whether the brochures which SP6 claimed he had posted, had arrived.

[31] The appellant said that with regard to the bag being left there by SP6, he was walking towards the direction of the guard room through the lift lobby area in order to catch up with SD2 and Dato' Haniffa and was about to call

SP6 and tell him to collect the bag from the guard but was arrested before he reached the guard house.

[32] According to SP6, after the arrest of the appellant, MPPP took over supervision of the project site and he successfully completed the works for both packages with the certificate of completion being issued for Package 1. The LAD for Package 1 was subsequently reduced from RM500,000 to RM92,000 after an appeal was made by SP6. In respect of Package 2, the works were successfully completed although an extension of time was given by MPPP after they took over the project.

Principles Regarding Appellate Interference

[33] The duty upon this court hearing an appeal from a subordinate court is set out in s. 316 of the Criminal Procedure Code and reads:

> **316. Decision on appeal**
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[34] In the case of *Periasamy a/l Sinnappan v. Public Prosecutor* [1996] 3 CLJ 187; [1996] 2 MLJ 557, Gopal Sri Ram JCA, (as His Lordship then was) had this to say:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v. PP* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39-40):

A ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v. Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

B With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *'the High Court should and will always give proper weight and consideration to such matters' as:*

(1) the views of the trial judge on the credibility of the witnesses;

C *(2) the presumption of innocence in favour of the accused;*

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

D Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt(or Thomas) v. Thomas* [1947] 1 All ER 582 that:

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court*
E *which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts
F as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v. Thomas*). On the facts of this case we do not think so.

In *Wilayat Khan v. State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and
G 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the
H presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.

…

I Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts. (emphasis added)

[35] The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 6 MLJ 523 where the Court of Appeal held:

> When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airline Ltd v. Maltran AirCorp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. China Airline Ltd v. Maltran AirCorp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1.
>
> The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that;
>
> a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or
>
> b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or
>
> c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or
>
> d) In so far aside the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[36] With these principles in mind I proceeded to the next stage of inquiry.

Analysis And Findings

i) Appeal No. 42LB-63-10-2013

First Amended Charge

[37] In respect of the first amended charge which is the subject matter of Appeal No. 42LB-63-10-2013, I dismissed the appeal by the prosecution (appellant) and upheld the decision of the Sessions Court which had acquitted the respondent (accused) at the close of the prosecution case.

[38] The accused was charged under s. 10 (a)(aa) of the Anti-Corruption Act 1997 which reads as follows:

> Offence of accepting gratification
>
> 10. Any person who by himself, or by or in conjunction with any other person:

(a) corruptly solicits or receives or agrees to receive for himself or for any other person; or

(b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or a reward for, or otherwise on account of:

(aa) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or

(bb) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned,

shall be guilty of an offence.

[39] In the context of the facts of this case, it was thus incumbent upon the prosecution to prove the following:

a) The respondent (accused) had solicited a gratification of the sum of RM400,000.00 directly from SP6;

b) The respondent (accused) had solicited such gratification corruptly; and

c) The respondent (accused) had solicited the gratification as an inducement to supposedly help SP6's company to obtain the tender for Package 2 and to supposedly refrain from interfering with work at the site while knowing that the selection process would be determined by the Tender Board

[40] In her grounds of judgment, the learned Sessions Court Judge had alluded to the evidence of SP6 that he had gone to the respondent's (accused) office to hand over the sum of RM270,000 but this was refused as the respondent (accused) wanted the sum of RM400,000 instead.

[41] The learned Sessions Court Judge also said that SP6 later referred to the sum of RM350,000 as being the amount involved. It was therefore reasoned that the value of the sum requested by the respondent (accused) in 2007 was not certain.

[42] The prosecution on the other hand, submitted that as they had successfully proven the first element of the charge, the presumption under s. 42(1) of the Anti-Corruption Act 1997 would apply to the effect that the second and third elements of the charge would then be presumed to have been proven. Section 42(1) reads as follows:

42(1) Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly

accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[43] Thereafter, they submitted, it was incumbent upon the respondent (accused) to rebut the presumption on a balance of probabilities. Now, the nature of presumptions were described in the case of *PP v. Ooi Seng Huat* [1968] 1 LNS 109; [1968] 2 MLJ 168 as follows:

Now as a matter of law a presumption is a statutory invention that upon the proof of a fact an inference of another fact can be drawn.

[44] In the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705, the workings of a statutory presumption were lucidly explained by Augustine Paul J (as he then was) as follows:

As a matter of law a presumption is a statutory invention that upon proof of a fact, called a basic fact, an inference of another fact, called the presumed fact, can be drawn (see *PP v. Ooi Seng Huat* [1968] 2 MLJ 168). In truth, therefore, a presumption is a statutory direction as to the drawing of inferences (see *Tong Peng Hong v. PP* [1955] MLJ 232). Thus it operates in place of evidence as it deems certain facts to have been proved (see *Ng Kim Huat v. PP* [1961] MLJ 308). Presumptions therefore do not deal with admissibility of evidence (see *PP v. Cheng Meng Bong & Ors* [1966] 1 MLJ 237) but with a special mode of proving facts which must otherwise be proved by evidence.

[45] It is clear therefore that a presumption can only operate if the basic facts are first proven. The presumption of the gratification being corruptly solicited as inducement under s. 42(1) proceeds from the basic fact which is the solicitation of the gratification of the said sum of RM400,000 from SP6. In this case, as the evidence of the prosecution was unclear as to the amount of gratification solicited by the respondent (accused), the basic fact in order to trigger the operation of the presumption was not proven by the prosecution and in all the circumstances, the presumption under s. 42(1) could not have arisen against the respondent (accused).

[46] The learned Sessions Court Judge had not erred therefore when she held that as the evidence disclosed that the amount of the gratification sought was uncertain and had changed, an essential element of the offence under s. 10 (a)(aa) of the Anti-Corruption Act 1997 had not been proven.

[47] This finding on the part of the learned Sessions Court Judge was a finding of fact that she was entitled to make after hearing and assessing the witnesses before her. The learned Sessions Court Judge had the audio-visual advantage of observing the witnesses, something denied to this court. The learned Sessions Court Judges' finding of fact therefore is entitled to great respect and must not be lightly interfered with save for good reason.

[48] On the authority of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89 and *Balachandran v. PP* [2005] 1 CLJ 85, the learned Sessions Court Judge had therefore rightly held that the prosecution (appellant) had failed to make out a *prima facie* case against the respondent (accused) in respect of the first amended charge. I therefore dismiss the appeal of the prosecution (appellant) in respect of the first amended charge and uphold the decision of the learned Sessions Court Judge.

ii) Appeal No. 42S-7-2-2014

Second Amended Charge

[49] Hereinafter, the accused at the Sessions Court is referred to as the appellant as this is his appeal in respect of Appeal No. 42S-7-2-2014.

a) Amendment Of Charge

[50] The appellant contended that the decision of the Sessions Court (SC) to amend the second amended charge was prejudicial to him. The appellant further contended that the amendment had substantially altered the prosecution case in a substantially different aspect namely, from recommending or "mencadangkan" to helping or "membantu".

[51] The decision of the SC to amend the charges in respect of the second amended charge at the end of the prosecution stage were made pursuant to the provisions of s. 158(1) of the Criminal Procedure Code (CPC) which reads as follows:

> 158. Court may alter or add to charge
>
> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[52] The amendments made were based upon the evidence given by the prosecution witnesses especially SP6 and SP12 with regard to the purpose for which the money was sought for and which amounted to helping or "membantu" SP6's company in securing the tender. I further find that the amendments did not involve any addition but only an alteration to the charge and in all the circumstances had not occasioned any prejudice to the appellant.

[53] Further, the appellant was in accordance with the provisions of s. 162 of the CPC afforded the opportunity to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and was at liberty to call any further evidence which may be material, an opportunity that he choose not to exercise.

b) Helping SP6 To Secure The Tender

[54] Although the appellant was not involved in the preparation of exhibit P7 (Laporan Perakuan Tender by MPPP), the evidence of SP3 was that MPPP had indirectly relied upon exh. P5 ("Laporan Penilaian Tender") prepared by the appellant in its recommendation paper to the Tender Board ("Lembaga Perolehan Tender") although P5 itself was not presented to the Tender Board.

[55] Following from this, SP3 further testified that MPPP had relied upon the expertise of the appellant in determining the price of the tender in submitting its recommendation to the Tender Board. SP6 had also given evidence that he had taken the range of price or "anggaran harga" submitted by the appellant in the computation for Package 2.

[56] From these chain of events, it was reasonable to conclude that as a result of the "Laporan Penilaian Tender" (P5), SP6's company, Syarikat Khasal Jaya did obtain high marks and had tendered a low price which led to its securing the job for Package 2. Upon a consideration of all the evidence therefore, it was clear that the appellant had informed SP6 that the tender for Package 2 would be out shortly and that he could help SP6 in securing the project.

[57] The prosecution evidence also revealed that the appellant had given an estimate figure in the region of between RM11 to RM13 million and in reliance upon this, SP6 put in a tender of RM11,175,000 which was within the range of the figure suggested by the appellant.

[58] As the element of the charge was "supposedly" or "kononnya", all that the prosecution had to prove was that the appellant had represented to SP6 that he could help SP6's company Khasal Jaya to secure the tender for Package 2 by submitting a favourable report. On the facts, this was adequately proven. It was not necessary therefore on the part of the prosecution to prove that the appellant had in fact helped SP6's company to secure the tender. Therefore the fact that the appellant had no part to play in the award of the marks did not in any manner prejudice the prosecution's case. In the premises, whether or not there arose any element of fraud was also irrelevant to proving the charge of helping SP6 to secure the tender.

[59] It was also not necessary to prove that favour in fact had been shown and the prosecution had merely to prove that the appellant did receive a bribe as an inducement to show favour. See *Gurbachan Singh v. PP* [1967] 1 LNS 50; [1966] 2 MLJ 125 where it was held:

> on a charge of corruptly receiving money or goods it is not necessary to prove that favour had been shown by the accused person.

A *c) The Allegation Of Disturbance Or "Mengganggu" Caused By The Appellant*

[60] The evidence showed that the total number of Engineering Instructions (EI) issued was 274 during a period amounting to 48% of the works under the supervision of CBS Jurutera Konsultan of which the appellant was the Managing Director. This was compared to only 3 EI issued
B by Majlis Perbandaran Pulau Pinang (MPPP) after they took over with up to 52% of the works completed. This gross disparity in the number of EI issued before and after MPPP took over the site supervision clearly evidenced that the appellant was "disturbing" the works in relation to Package 2 during his tenure.

C

[61] The issuance of the EI adversely affected the reputation of SP6's company and led to inevitable delay in the completion of the project. Although SP6 was subjected to challenge in respect of the issuance of the EI's, he had given credible explanation as to why the issuance of the EI's were unjustified in the circumstances.

D

[62] It was also given in evidence that after the offer letter (P6) was issued to SP6's company, works commenced on 7 May 2007. For Package 2, SP6 had received an advance of RM2,700,011 million during the third month of works and it was after that, that the appellant had started to ask for the
E money. The fact that this advance payment was made by MPPP and not processed by the appellant's company made no difference. The fact of the matter was that the timing was such that the appellant had started to ask for the money after the advance was made. From this it can be reasonably inferred that the appellant had indeed requested for the money from SP6 at that point of time.

F

[63] SP11 had also testified that the reason SP6 had intended to deliver the sum of RM270,000 to the appellant was so that the project would not encounter any delay and that it would run smoothly. This would indicate that there were disturbances at the site even from the time that SP11 was still the
G project manager. Although SP11 testified that he was unaware if the appellant had requested for the said sum, this is altogether different from saying that the appellant had never requested for the said sum of RM270,000. SP11 however, did mention that according to SP6, the reason for the appellant rejecting the sum of RM270,000 was that he possibly wanted more.

H **[64]** From the evidence and the totality of the circumstances, there was ample evidence of the fact that the appellant had requested money from SP6 in exchange for not disturbing the works related to the project. There was also ample evidence that disturbance was caused by the appellant to the works at the site.

I

d) The Meeting On 1 July 2009 Between Sp6 And The Appellant At The Latter's Office

[65] The result of the aforesaid disturbances culminated in SP6 going to the office of the appellant on 1 July 2009 in order to discuss the matter. After much persuasion on the part of SP6, the amount demanded by the appellant was reduced from RM400,000 to RM350,000. A further request by SP6 to pay in instalments was rejected. Although SP6 had testified that he had problems with the Bomanite concrete imprints, it was never suggested to SP6 that the areas D43 and D44 required change to red jet as a result. This combined with the fact that at the material time almost 98% of the area to Package 1 was completed utilising the Bomanite concrete imprints, does not make it probable that the purpose of SP6's visit to the appellant's office was in order to discuss the change of the concrete imprints. If this was indeed the purpose of SP6's visit, SD5 being the site engineer of the project would have also been present at the meeting. It was also not suggested to SP6 during cross-examination that SD5 was within earshot and had heard the conversation between them.

[66] Under the circumstances, the evidence of SP6 that the purpose of the meeting that day was to discuss the reduction of the sum of RM400,000 to RM350,000 which the appellant eventually agreed to, was not successfully rebutted by the appellant. This agreement of the appellant to reduce the sum as mentioned and his refusal of the offer to pay in instalments ultimately set the stage for the meeting on 8 July 2009 culminating in the arrest of the appellant.

e) The Incident On 8 July 2009 At The Hallway Or "Ruang Legar" At Menara BHL

[67] Prior to the meeting on 8 July 2009 at Menara BHL, the prosecution evidence was that SP6 had a telephone conversation with the appellant. During that telephone conversation, SP6 told the appellant, "the money is with me" and a trap meeting was arranged at Menara BHL at 11am. The appellant on the other hand, testified that the connecting phone line was unclear and subject to interruptions and that he in fact heard the words "the dummy with me" instead.

[68] The transcript of the telephone conversation (P25C) on the other hand had showed that the words "dummy" or "brochure" was not used. The transcript also evidenced that the appellant was unhesitant when he responded "Ya" when SP6 told him "the money with me". The appellant had also never asked for SP6 to repeat himself as would be the case if the telephone line was unclear as alleged.

A **[69]** Although it was suggested to SP10 during cross-examination that the expression used was "concrete imprint pavement", the phrase "dummy" was not used or suggested. Therefore the submission that the appellant had misheard what SP6 had said is untenable and an afterthought on the part of the appellant. In any event, the fact that there was a telephone conversation
B between SP6 and the appellant that day was not in dispute. The bone of contention by the appellant was that the line of communication was unclear and that the appellant thought that he had heard SP6 say "dummy" instead of "money".

[70] If the subject matter of the conversation between SP6 and the appellant
C was regarding the "dummies" or the brochure, the most reasonable thing to have happened would have been for SP6 to go up to the appellant's office and to meet SD5 instead. Under the circumstances, there was no necessity for SP6 to contact the appellant upon his arrival.

[71] It would have been also more in accord with reason if the "dummies"
D had been given and received in the appellant's office and not in the hallway or "ruang legar". In any event, if the objective was indeed to deliver the "dummies", that objective remained unfulfilled when SP6 merely left it at the ruang legar without so much as a discussion with the appellant regarding the same.

E **[72]** In the light of the fact that the appellant had instructed SP6 to go up and meet SD5 who was waiting for him, there was also no necessity for the appellant to see the "dummies" in the car boot. Although the appellant had denied this, there was no reason to disbelieve the evidence of the prosecution witnesses on this point.

F **[73]** The evidence of the appellant that he did not know of the contents of the paper bag (P20) cannot be sustained in the light of the fact that SP6 and SP10 had testified that the appellant was shown the marked money in the boot of the car when SP6 lifted the plastic bag. Although the appellant testified in response to SP6's question whether he wanted to count the money
G that he said "never mind, bring it along" which he said meant "bring along the brochure", the conduct of the appellant in this regard was more consistent with someone who knew that the contents of the bag in fact contained money.

[74] The evidence of the appellant was that he was unaware that SP6 had
H left the bag (P20) containing the money. This is at variance with the testimony of SP6 that he had left the bag (P20) in front of the appellant. The testimony of SP6 was corroborated by other prosecution witnesses. The appellant had also shaken hands with SP6. Right after this, the appellant was seen taking the bag and walking towards the direction of the lift.

I

[75] The testimony of the appellant that after he took the bag he attempted to contact SP6 in order to return the bag is not reasonable in light of the fact that the appellant had just left the appellant's presence and therefore the appellant could have easily caught up with SP6 for this purpose. From a totality of the evidence, it was clear that there was no attempt made by the appellant to return the bag containing the money to SP6.

[76] The reaction and conduct of the appellant while at the post box also indicates that he knew of the contents. The evidence of the appellant that he was looking for catalogues even though he had requested SP6 to hand them over to Mr Teh does not support his defence. The conduct of the appellant in looking around furtively before he took the bag also allows the fair inference to be made that he was intent to avoid detection.

[77] In light of the fact that SP6 was within easy reachable distance to the appellant, the evidence of the appellant that he intended to hand over the bag (P20) to the guard instead also does not seem reasonable. Further, there was no logical reason why SP6 would leave a bag containing RM350,000 of marked notes if it was not in pursuance of the request made by the appellant.

[78] The occurrences that took place at the car park, followed by the placing of the bag (P20) at the post box area and the conduct of the appellant in looking around before picking up the said bag and walking towards the direction of the lift and his subsequent arrest with the bag in his possession is more consistent with the fact that at the meeting at the appellant's office on 1 July 2009, an arrangement was made for the sum of RM350,000 to be handed by SP6 to the appellant. The events that took place as described on 8 July 2009 was a follow up of the earlier aforesaid meeting and the telephone call that SP6 had made to the appellant prior to the meeting that day.

[79] The discovery of the marked notes with the appellant also constitute independent corroborative evidence which led to the irresistible conclusion that the appellant had received the money corruptly. See *Ramly Md Yasin & Ors v. Public Prosecutor* [1982] CLJ 200; [1982] CLJ (Rep) 724.

f) Accomplice Evidence

[80] It was submitted by the appellant that as SP6 was involved in giving the gratification, his evidence was that of an accomplice and therefore required corroboration. It is relevant here to refer to s. 52(1) of the Malaysian Anti-Corruption Commission Act 2009 which reads as follows:

> 52. Evidence of accomplice and agent provocateur
>
> (1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act:

A (a) no witness shall be regarded as an accomplice by reason only of such witness having:

(i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;

B (ii) given, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

C (b) no *agent provocateur*, whether he is an officer of the Commission or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

D

(c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.

E (2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or *agent provocateur* shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the F danger of convicting on such evidence.

[81] The intent of the section was thus to place such accomplice evidence on the same footing as that of ordinary witnesses and therefore there is no necessity imposed upon the trial court to warn itself of the dangers of convicting on such uncorroborated evidence. See *PP lwn. Rahiman Selamat & Kes Yang Lain* [2015] 3 CLJ 92. In any event, the testimonies of SP5, SP8 G and SP10 provided ample corroboration of the testimony of SP6 with respect to the receipt of the bag containing the marked notes by the appellant. The conviction of the appellant by the Sessions Court based upon the evidence of SP6 was thus not flawed in this respect.

H *g) Evidence Of SP10*

[82] Although the evidence of SP10 was subject to sustained challenge by learned counsel for the appellant, from a consideration of the totality of the evidence given by SP10, his version that he was able to witness the incident I at the car park area from where he was situated was not inherently improbable and can therefore be accepted. See the case of *PP v. Mohamed Ali*

[1962] 1 LNS 129; [1962] 1 MLJ 257 where Thompson CJ had held as follows:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[83] It is not improbable that as SP10 had arrived at the scene earlier than SP6 and the appellant, and had taken his position after witnessing SP6 and the appellant arrive at the car park, that SP6 and the appellant was unaware of his presence. Although it was challenged that from where SP10 was situated, he could not have possibly seen or heard the conversation between SP10 and the appellant, his testimony on this point was unshaken.

[84] It was further not suggested to SP10 that the appellant had in fact expected to find the "dummies" and that SP6's response was that he had forgotten to bring it. Under the circumstances, the testimony of SP10 that SP6 had said the words "this is the money, do you want to count?" and the reply by the appellant, "bring it along", can be safely accepted. The difference in the version "this is the money, do you want to count" with "this is the money, do you want to see" was not so material as to affect the credibility and testimony of SP10 in this respect.

[85] In any event, during re-examination, SP10 had explained why he gave two versions. It was further not suggested to SP10 that the appellant did not see the contents of the bag P20 and therefore his testimony in this regard can be accepted. Moreover, it was not suggested or proven that SP10 had any axe to grind with the appellant and therefore his evidence ought to be regarded with suspicion. See *Philomene Thea v. PP* [2013] 1 LNS 1497; [2014] 1 MLJ 396, where the court had opined that in the absence of motive to falsely impute the commission of a crime against the appellant, the evidence of the prosecution witnesses is to be accepted.

h) Receipt Of The Money (The Marked Notes) And The Invocation Of The Statutory Presumption Under s. 50(1) Malaysian Anti-Corruption Commission Act 2009

[86] No less than four witnesses comprising SP6, SP5, SP8 and SP10 had testified that the bag containing the marked notes left on the floor at the lobby at Menara BHL near to the post box next to the appellant, was taken by him. When the appellant was arrested, he was also found holding the bag containing the marked notes.

[87] Under the circumstances, the statutory presumption under s. 50(1) of the Malaysian Anti-Corruption Commission Act 2009 arose and it was presumed that the money was given and received corruptly and it was then for the appellant to rebut the said presumption on a balance of probabilities. See *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162, *Thavanathan Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150 and *PP v. Yuvaraj* [1968] 1 LNS 115; [1968] 1 MLJ 238.

[88] The said s. 50(1) Malaysian Anti-Corruption Commission Act 2009 reads:

> 50. Presumption in certain offences
>
> (1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[89] Gratification which is defined in s. 3 of the said Act is very wide and reads as follows:

> "gratification",
>
> means:
>
> (a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;
>
> (b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;
>
> (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
>
> (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
>
> (e) any forbearance to demand any money or money's worth or valuable thing;
>
> (f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
>
> (g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);

[90] The learned Sessions Court Judge (SCJ) had therefore not erred when she held that the prosecution had proven a *prima facie* case against the appellant and called for his defence.

i) Delay In Charging The Appellant

[91] P24 was made some 17 months after P10 (first police report). The first amended charge was stated to have occurred in 2007 while the material date of the second amended charge occurred on 8 July 2009 and the appellant was charged on 6 January 2011. The appellant submitted that no explanation was forthcoming from the prosecution as to the reasons for the delay.

[92] Notwithstanding the delay in charging the appellant, there was upon a consideration of all the circumstances, no prejudice caused to the appellant. There is also no limitation issue in the institution of criminal charges and I therefore find no merit in the contention of the appellant on this point. In any event, the report is only the machinery through which charges are preferred and which triggers investigation into the commission of an offence and this does not in any way detract from the facts as testified to by the prosecution witnesses.

j) Admissibility Of The Tape Recording And Transcripts

[93] The prosecution had tendered in evidence the authority to intercept communication (P34) or ("surat kuasa memintas perhubungan") pursuant to the provisions of s. 43(4) of the Malaysian Anti-Corruption Commission Act 2009 and therefore had successfully laid the basis for the admissibility of the transcript in evidence.

[94] In respect of the tape recording, from the evidence of SP9, SP6, and SP12, there was no break in the chain of exhibits. This also was the case in respect of the transcript (P25C) of the conversation between SP6 and the appellant.

k) The Reduction Of The Liquidated And Ascertained Damages Clause (LAD)

[95] The alleged motive on the part of SP6 in seeking to eliminate the involvement of the appellant in the project in order to reduce or avoid the imposition of the LAD for package 1 and 2 and the alleged complicity between SP6 and SP3 in this respect was not suggested to SP3 during cross-examination and remained a mere allegation on the part of the appellant.

l) The Absence Of Body Recording Equipment And CCTV Recording

[96] While the implementation of body recording equipment and CCTV recording may have supplemented the prosecution case, their absence does not under the circumstances occasion any prejudice or result in any infirmity to the prosecution case and neither does it give rise to any adverse inference against the prosecution.

m) The Learned SCJ Wrongly Stated That The Appellant Had Called Four Instead Of Five Witnesses And Wrongly Referred To SD5 As SD2

[97] Although the SCJ had made these erroneous references, I do not find that they were in any way material to the decision arrived at. The SCJ's decision was based upon the evidence tendered by the respective witnesses for the prosecution and the fact that she stated the wrong number of witnesses called by the appellant does not have a bearing on the outcome of the case as it is the quality of evidence given by witnesses that is material and not the number of witnesses called. The erroneous reference to SD5 as SD2 does not materially affect the outcome reached based upon the totality of the evidence adduced and the circumstances of the case.

n) Failure To Consider The Evidence Of SP11

[98] The appellant submitted that the SCJ had not considered the testimony of SP11 in coming to her findings. The events that occurred on the day of the meeting on 1 July 2009 between SP6 and the appellant at the latter's office took place when SP6 was alone with the appellant. In his evidence in chief, SP11 testified that he was with SP6's company for only up to the stage of completion of between 20 to 30 percent for Package 2. The material dates that immediately led to the arrest of the appellant took place on 1 July 2009 and 8 July 2009 respectively by which time SP11 had already left SP6's company and therefore the evidence of SP11 had little consequence or bearing as to the case against the appellant in that respect. In any event, SP11 had testified that he and SP6 had earlier gone together with the intention of giving the sum of RM270,000 to the appellant.

o) Other Issues Raised

[99] There were other issues raised in the petition of appeal which I have not specifically dealt with in this judgment, for example, not allowing learned counsel for the appellant to make oral clarification to supplement written submission and the alleged contradiction between SP6 and SP4 as to the fact that SP6 and his lawyer had gone to the SPRM office to lodge a report.

[100] However, having considered these other issues I find that they are not material to the outcome of this appeal and would not affect the decision made in any event.

Decision

[101] From a consideration of all the circumstances and evidence adduced, the SCJ had not erred in coming to the findings that she did in respect of the conviction of the appellant. The SCJ had made findings of fact and it is trite that such findings are not to be lightly disturbed unless they are not warranted from the evidence or the inferences drawn from these facts were wrongly made, neither of which are present here.

[102] The SCJ also had the audio visual advantage in observing the demeanour of all the witnesses including the appellant and I find nothing to indicate that such advantage had translated into a wrong conclusion on her part. I further find that the sentence passed upon the appellant was appropriate in the circumstances and the SCJ had not erred in law or principle in passing the said sentence. I therefore dismiss the appellant's appeal against his conviction and sentence in respect of the second amended charge and uphold the decision of the learned SCJ.

A

B

C

D

E

F

G

H

I